

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

Respondents.

**PETITIONER’S REPLY TO
RESPONDENTS’ OPPOSITION TO
PETITIONER’S PETITION FOR
TEMPORARY INJUNCTION UNDER
SECTION 10(j) OF THE NATIONAL
LABOR RELATIONS ACT**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE RELIEF REQUESTED BY PETITIONER IS WARRANTED	1
A.	The Balance of the Equities Strongly Favors Petitioner	1
1.	Respondents’ Reliance on 29 U.S.C. § 160(c) is Misguided	1
2.	Respondents’ First Amendment Rights Would Not Be Impacted by the Requested Relief	3
3.	The Requested Relief Does Not Interfere with Employees’ Associational Freedom, and, Instead, Protects It	5
4.	Employees’ Rights Outweigh the Speculative Harm Asserted By Respondents	7
B.	Petitioner Established Irreparable Harm of Employees’ Statutory Rights	10
1.	The Board’s Remedy Will Be Wholly Undermined Without the Court’s Intervention	10
2.	Record Evidence and Controlling Precedent Support Finding Irreparable Harm	11
3.	Respondents’ “Delay” Argument is Meritless	12
C.	Petitioner Established a Likelihood of Success on the Merits	13
1.	Applicable Burden of Proof	14
2.	Respondents’ Conflicting Evidence Does Not Preclude Petitioner’s Showing of Likelihood of Success on the Merits	15
a.	Petitioner Established Respondents’ Knowledge	15
b.	Respondents’ “Scapegoat” Theory Fails to Undermine Petitioner’s Showing of Likelihood of Success on the Merits	16
c.	Petitioner Established that Respondents were Unlawfully Motivated to Discharge Employees and Reduce Working Hours	18
i.	Respondents’ Proffered Reasons for Discharging Taylor Bohannon and Nathaniel Franco are Pretext	18

1	ii.	Respondents’ Proffered Reasons for Discharging Alanzi	
2		Langstaff, Jasmine Glick, and Kevin Michaels are Pretext	21
3	iii.	Respondents’ Proffered Reasons for Discharging Zachary	
4		Graham are Pretext	25
5	iv.	Respondents’ Proffered Reasons for Discharging Leigh-Ann	
6		Hill are Pretext	27
7	v.	Respondents’ Proffered Reasons for Discharging Chris	
8		Suapaia are Pretext.....	30
9	vi.	Respondents’ Proffered Reasons for Discharging Michael Gasca	
10		are Pretext	31
11	vii.	Respondents Proffered Reasons for Reducing Employees’	
12		Hours and Disciplining Scott Tupy are Pretext	35
13	viii.	Respondents’ Proffered Reasons for their Actions Against	
14		Stephen Urbanksi are Pretext and Relief is Necessary Despite	
15		His Employment Status.....	37
16	d.	Petitioner has Shown a Likelihood of Success in Showing that	
17		Respondents’ Wage Increase Violated the Act.....	39
18	e.	Petitioner has Established a Likelihood of Success on the Merits of the	
19		Remaining Allegations Addressed by Respondents	42
20	D.	Injunctive Relief is in the Public Interest.....	43
21	III.	CONCLUSION.....	44

TABLE OF AUTHORITIES

		Page(s)
1	Cases	
2		
3	<i>Abbey's Transportation Services, Inc.,</i>	
4	284 NLRB 698 (1987).....	15
5	<i>Accubuilt, Inc.,</i>	
6	340 NLRB 1337 (2003).....	40
7	<i>Aguayo v. Tomco Carburetor Co.,</i>	
8	853 F.2d 744 (9th Cir. 1988).....	8, 12, 13
9	<i>Ahrens v. Bowen,</i>	
10	852 F.2d 49 (2d Cir. 1988).....	39
11	<i>Alco Electric Co., Inc.,</i>	
12	258 NLRB 819 (1981).....	20, 22, 33
13	<i>Avery Leasing, Inc.,</i>	
14	315 NLRB 576 (1994).....	28
15	<i>B&K Builders, Inc.,</i>	
16	325 NLRB 693 (1998).....	43
17	<i>Bates Paving & Sealing, Inc.,</i>	
18	364 NLRB No. 46 (2016).....	21
19	<i>Calatrello v. Gen. Die Casters, Inc.,</i>	
20	190 LRRM 2157, 2011 WL 446685 (N.D. Ohio 2011).....	5
21	<i>Case Farms of N. Carolina, Inc.,</i>	
22	353 NLRB 257 (2008).....	21
23	<i>Chamber of Commerce v. Brown,</i>	
24	554 U.S. 60 (2008).....	4
25	<i>Cincinnati Truck Center,</i>	
26	315 NLRB 554 (1994).....	20, 22
	<i>Cook Family Foods,</i>	
	311 NLRB 1299 (1993).....	23, 24, 34
	<i>Donaldson Bros. Ready Mix,</i>	
	341 NLRB 958 (2004).....	40

1	<i>Edward G. Budd Mfg. Co. v. NLRB</i> ,	
2	138 F.2d 86 (3rd Cir. 1942).....	20, 22, 33
3	<i>Enterprise Prods.</i> ,	
4	364 NLRB 946 (1982).....	28
5	<i>Fernbach v. Sprain Brook Manor Rehab, LLC</i> ,	
6	91 F. Supp. 3d 531 (S.D.N.Y. 2015).....	5
7	<i>Frankl v. HTH Corp.</i> ,	
8	650 F.3d 1334 (9th Cir. 2011).....	Passim
9	<i>Frankl v. HTH Corp.</i> ,	
10	693 F.3d 1051 (9th Cir. 2012).....	8, 11, 14
11	<i>Garcia v. Fallbrook Hosp. Corp.</i> ,	
12	952 F.Supp.2d 937 (S.D. Cal. 2013)	12
13	<i>Garcia v. Sacramento Coca-Cola Bottling Co.</i> ,	
14	733 F. Supp. 2d 1201 (E.D. Cal. 2010).....	5
15	<i>Gibraltar Steel Corp.</i> ,	
16	323 NLRB 601 (1997).....	40
17	<i>Grand Lodge Int’l Association of Machinists</i> ,	
18	159 NLRB 137 (1966).....	6
19	<i>Greco & Haines, Inc.</i> ,	
20	306 NLRB 634 (1992).....	15, 16, 20, 22
21	<i>Ideal Elec. & Mfg. Co.</i> ,	
22	134 NLRB 1275 (1961).....	40
23	<i>Jewish Home for the Elderly of Fairfield County</i> ,	
24	343 NLRB 1069 (2004).....	40
25	<i>Kobell v. United Paperworkers Int’l Union</i> ,	
26	965 F.2d 1401 (6th Cir. 1992).....	39
	<i>Lucky Cab Company</i> ,	
	360 NLRB 271 (2014).....	20, 22, 23, 24
	<i>ManorCare Health Services – Easton</i> ,	
	356 NLRB 202 (2010).....	20, 22
	<i>Matthews Industries</i> ,	

1	312 NLRB 75 (1993).....	15
2	<i>McCotter Motors Co.,</i>	
3	291 NLRB 764 (1988).....	23, 24, 34
4	<i>NLRB v. Electro-Voice, Inc.,</i>	
5	83 F.3d 1559 (7th Cir.1996).....	9, 13
6	<i>NLRB v. Gissel Packing Co.,</i>	
7	395 U.S. 575 (1969)	4
8	<i>NLRB v. Hale Container Line, Inc.,</i>	
9	943 F.2d 394 (4th Cir. 1991).....	23, 24, 34
10	<i>NLRB v. Transmart, Inc.,</i>	
11	117 F.3d 1421 (6th Cir. 1997).....	20
12	<i>Norelli v. HTH Corp.,</i>	
13	699 F. Supp. 2d 1176 (D. Haw. 2010)	5
14	<i>Overstreet v. El Paso Disposal, LP,</i>	
15	625 F.3d 844 (5th Cir. 2010).....	13
16	<i>Overstreet v. Gunderson Rail Svcs.,</i>	
17	587 Fed. Appx. 379 (9th Cir. 2014)	9, 10
18	<i>Overstreet v. One Call Locators Ltd.,</i>	
19	46 F. Supp. 3d 918 (D. Ariz. 2014).....	5
20	<i>Overstreet v. Shamrock Foods Co.,</i>	
21	679 Fed. Appx. 561 (9th Cir. 2017)	4, 12
22	<i>Overstreet v. United Bhd. of Carpenters and Joiner of Am., Local Union No.,</i>	
23	409 F.3d 1199 (9th Cir. 2005).....	3, 4
24	<i>Promenade Garage Corp.,</i>	
25	314 NLRB 172 (1994).....	23, 24, 34
26	<i>PVM I Associates, Inc.,</i>	
	328 NLRB 1141 (1999).....	20, 22, 33
	<i>Pye v. Excel Case Ready,</i>	
	238 F.3d 69 (1st Cr. 2001)	9
	<i>Real Foods Co.,</i>	
	350 NLRB 309 (2007).....	40

1	<i>Regional Home Care, Inc.</i> ,	
2	329 NLRB 85 (1999).....	15
3	<i>Rubin v. Vista del Sol Health Services, Inc.</i> ,	
4	2015 WL 306292 (C.D. Cal. Jan. 22, 2015)	5
5	<i>Shamrock Foods Co.</i> ,	
6	366 NLRB No. 117 (2018).....	40
7	<i>Shattuck Denn Mining Co. v. NLRB</i> ,	
8	362 F.2d 466 (9th Cir. 1966).....	20, 22
9	<i>Silverman v. Whittal & Shon, Inc.</i> ,	
10	125 LRRM 2150, 1986 WL 15735 (S.D.N.Y. 1986).....	13
11	<i>Sisters' Camelot</i> ,	
12	363 NLRB No. 13 (2015).....	40
13	<i>Small v. Avanti Health Sys., LLC</i> ,	
14	661 F.3d 1180 (9th Cir. 2011).....	12, 14
15	<i>Tetrad Co.</i> ,	
16	122 NLRB 203 (1959).....	6
17	<i>Traction Wholesale Center Co., Inc. v. NLRB</i> ,	
18	216 F.3d 92 (D.C. Cir. 2000)	16, 19
19	<i>Tres Estrellas de Oro</i> ,	
20	329 NLRB 50 (1999).....	20
21	<i>United Nurses Assocs. of Cal. v. NLRB</i> ,	
22	871 F.3d 767 (9th Cir. 2017).....	5
23	<i>Wright Line</i> ,	
24	251 NLRB 1083 (1980).....	20, 22
25	Statutes	
26	29 U.S.C. § 158(a)(1).....	40, 42
	29 U.S.C. § 158(c)	4
	29 U.S.C. § 160(c)	1, 2, 3

I. INTRODUCTION

Respondents, through its Opposition to the Petition (ECF No. 11), attempt to undermine Petitioner's request, and support for, injunctive relief on several grounds. In sum, Respondents target Petitioner's strong showing of irreparable harm by highlighting a perceived delay while ignoring the demonstrable record evidence of irreparable harm. Respondents also set forth its own evidence to show that the balance of hardships weigh in its favor, primarily by relying on inapplicable authority and advancing highly speculative evidence of its own. Finally, Respondents attempt to undercut Petitioner's strong showing of likelihood of success on the merits by advancing its justifications for its conduct: justifications that Petitioner has shown are no more than pretext. As discussed below, Respondents have failed on every front to show that injunctive relief is not otherwise just and proper in circumstances such as these, in which Respondents took swift and effective action to eradicate its workforce of employees seeking union representation under the protection of the National Labor Relations Act. Respectfully, Petitioner seeks corollary swift and effective relief from this Court, as should be deemed just and proper.

II. THE RELIEF REQUESTED BY PETITIONER IS WARRANTED

A. The Balance of the Equities Strongly Favors Petitioner

1. Respondents' Reliance on 29 U.S.C. § 160(c) is Misguided

In an apparent attempt to find statutory support for their position that the balance of equities tip in their favor, Respondents argue that Petitioner seeks the extraordinary relief before this Court as an "end run" around edicts embodied in Section 10(c) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(c)). ECF No. 11 at 7. That section of the Act provides that the National Labor Relations Board (the Board) may not issue orders of reinstatement or

1 backpay in such cases where the Board determines, and reduces to writing, as proscribed, that an
2 employee was discharged for cause.¹ If there were an inherent conflict with this provision and
3 the injunctive relief sought before the Court, countless district court orders granting the Board's
4 requests for interim reinstatement remedies would be invalidated. This is because, in virtually
5 every case where it is alleged that a respondent employer has discharged an employee for
6 engaging in protected activities, the employer claims it discharged the employee for some other,
7 lawful reason.

8 Respondents make several bald assertions to support their claim that this Court cannot
9 grant the relief requested here. First, Respondents claim that the relief sought – reinstatement and
10 expungement of related employment records – is “an undeniable overreach consisting of relief
11 more akin to that of a final judgment on the merits.” ECF No. 11 at 7. This is not the case.
12 Petitioner is seeking an order requiring Respondents to make an offer of interim reinstatement,
13 meaning that the relief of reinstatement would only persist until there is a final judgment in the
14 matter.
15

16 Respondents also contend that the “requested relief is wholly improper as it violates
17 provisions of the NLRA intended to preserve the rights of employers to make disciplinary and
18 employment termination issues regarding its employees,” in reference to Section 10(c) of the Act
19 (29 U.S.C. § 160(c)) discussed above. ECF No. 11 at 8. To bolster this position, Respondents
20 iterate the “valid concerns” they relied upon in discharging the aggrieved employees. ECF No.
21 11 at 8. However, as discussed at length below, in relation to Petitioner's likelihood of success
22 on the merits, Respondents did not discharge the employees at issue for valid concerns. Rather,
23 evidence shows that Respondents attempted to dredge up any and all concerns that could
24

25 ¹ See *Frankl v. HTH Corp. (Frankl I)*, 650 F.3d 1334, 1348-1350 (9th Cir. 2011), *cert. denied*
26 139 S.Ct. 1821 (2012) (discussing § 10(c) in relation to § 10(j) of the Act).

1 possibly shield them from liability, but the record overwhelmingly supports a finding that these
2 reasons are pretext.

3 Moreover, if the Court grants Petitioner's relief, Respondents will enjoy the protections
4 of Section 10(c) of the Act (29 U.S.C. § 160(c)), as they always have. Respondents have and will
5 continue to have the right to make disciplinary decisions, so long as those decisions are not
6 unlawfully motivated. Thus, respectfully, the Court should reject Respondents' attempt to show
7 that the equities tip in their favor based on their misplaced reliance on Section 10(c) of the Act
8 (29 U.S.C. § 160(c)).

9
10 2. Respondents' First Amendment Rights Would Not Be Impacted by the
Requested Relief

11 Respondents argue that the balance of equities weigh in their favor because the requested
12 relief "unlawfully interferes" with their First Amendment rights and statutory free speech rights
13 codified in the Act. ECF No. 11 at 9. In support of their argument, Respondents contend that: (1)
14 Petitioner impermissibly seeks to rely on protected speech to bolster the underlying claims, and
15 (2) the requested relief would impermissibly require Respondents to communicate with
16 employees, in various ways, the potential order issued by this Court. Respondents further suggest
17 that a heightened standard ought to apply given the supposed risk that constitutionally protected
18 speech will be enjoined. ECF No. 11 at 10 (citing *Overstreet v. United Bhd. of Carpenters and*
19 *Joiner of Am., Local Union No. 1506*, 409 F.3d 1199, 1208 n.13 (9th Cir. 2005)). However, this
20 case does not present any risk that constitutionally protected speech will be enjoined.

21
22 First, contrary to Respondents contention, Petitioner only relies upon and seeks to enjoin
23 coercive speech, which is not protected by the First Amendment as embodied in Section 8(c) of
24
25
26

1 the Act (29 U.S.C. § 158(c)).² In support of their position, Respondents highlight an incident
2 when Respondents' owner, David Saxe (Saxe) informed employees that he knew they supported
3 the union effort as an example of "non-coercive" speech relied upon by Petitioner. ECF No. 11 at
4 10. In doing so, Respondents distort, without presenting any evidentiary support, the incident at
5 issue by describing it as one where the employee – not Saxe – informed the other of his support
6 for the Union at first instance. ECF No. 11 at 10 (lines 13-18, providing no citations). However,
7 as the employee's testimony shows in full context,³ Saxe approached employees Darnell Glenn
8 and Scott Tupy and told them that he knew they supported the union. As discussed within
9 Petitioner's Memorandum and Points of Authority (ECF No. 1, MPA), by this conduct, Saxe
10 unlawfully created the impression that Respondents were keeping track of employees' union
11 sympathies, which amounts to unlawful coercive conduct. Moreover, Petitioner is only seeking,
12 in relevant part, an order requiring Respondents to cease and desist from engaging in coercive
13 speech, which is not protected. Thus, Respondents have failed to show any risk that
14 constitutionally speech will be enjoined. As such, the Court should not find a hardship or apply a
15 heightened standard in this case as suggested by Respondents.⁴
16

18 ² *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Chamber of Commerce v. Brown*, 554
19 U.S. 60, 67 (2008) (noting that the Supreme Court has "recognize[ed] the First Amendment right
of employers to engage in noncoercive speech about unionization").

20 ³ Compare PX 32 at 15-16 with RX 41 at 6-7. RX 41 omits the full context of testimony on this
issue.

21 ⁴ See *Overstreet v. Shamrock Foods Co.*, 679 Fed. Appx. 561, 564 (9th Cir. 2017) (finding a
22 heightened standard set forth in *Overstreet v. United Bhd. of Carpenters and Joiner of Am.*,
23 *Local Union No. 1506*, 409 F.3d 1199, did not apply to an injunction prohibiting interrogation,
threats, promises, and telling employees to report union activities because it "prohibits only
24 coercive speech, which is not protected by the First Amendment or the National Labor Relations
Act" and "does not prevent [the employer] from expressing its opinions regarding union
25 representation, or from otherwise engaging in noncoercive speech" and therefore "does not
present a risk of infringing [the employer's] rights under the First Amendment or Section 8(c) of
the NLRA").

1 Second, Respondents claim that requiring them to inform employees of the Court's order
 2 by posting a notice at their facility, electronically delivering such notice, and holding a meeting
 3 with employees to read the notice, "significantly infringes upon Respondents' free speech
 4 rights." ECF No. 11 at 10-11. Notably, although courts routinely issue such orders, Respondents
 5 provide no authority for their position. Rather, Respondents simply state that such a requirement
 6 would make them "appear guilty despite a final determination" and "create confusion about the
 7 status of the underlying dispute." ECF No. 11 at 11. The Board and Courts have repeatedly
 8 found otherwise.⁵

9 Respondents have flouted their employees' rights during the course of the union
 10 campaign. It should not be considered a hardship for them to take the appropriate measures, such
 11 as ensuring that employees have information about their rights and assurances that Respondents
 12 will respect those rights in the future. Furthermore, in light of Petitioner's showing of likely
 13 irreparable harm and likely success on the merits (discussed at length below and within
 14 Petitioner's MPA), the Court should find, respectfully, that considerable weight is on Petitioner's
 15 side of the balance of hardships here.⁶

17 3. The Requested Relief Does Not Interfere with Employees' Associational 18 Freedom, and, Instead, Protects It

19 Respondents also assert that "the requested relief improperly coerces an associational
 20 relationship on employees who voted against union representation." ECF No. 11 at 10.

21 ⁵ *United Nurses Assocs. of Cal. v. NLRB*, 871 F.3d 767, 788-89 (9th Cir. 2017) (emphasis in
 22 original); *Norelli v. HTH Corp.*, 699 F. Supp. 2d 1176, 1206-07 (D. Haw. 2010) (ordering
 23 reading of court order), *aff'd*, 650 F.3d 1334 (9th Cir. 2011); *Fernbach v. Sprain Brook Manor*
 24 *Rehab, LLC*, 91 F. Supp. 3d 531, 550 (S.D.N.Y. 2015); *Rubin v. Vista del Sol Health Services,*
 25 *Inc.*, 2015 WL 306292, at *2 (C.D. Cal. Jan. 22, 2015); *Overstreet v. One Call Locators Ltd.*, 46
 26 F. Supp. 3d 918, 932 (D. Ariz. 2014); *Calatrello v. Gen. Die Casters, Inc.*, 190 LRRM 2157,
 2011 WL 446685, at *8 (N.D. Ohio 2011); *Garcia v. Sacramento Coca-Cola Bottling Co.*, 733
 F. Supp. 2d 1201, 1218 (E.D. Cal. 2010).

⁶ *Frankl I*, 650 F.3d at 1365.

1 However, this claim fails factually and as a matter of law. First, factually, Respondents'
2 contention that their employees voted against Union representation is a misrepresentation. At the
3 election, 19 votes were cast for the Union, 22 votes were cast against it, and 7 challenged ballots
4 were cast. The challenged ballots were cast employees who Petitioner contends were unlawfully
5 discharged because of their support for the Union. Those discriminatees' ballots will be opened
6 and counted if their discharges are ultimately found to be unlawful. *Grand Lodge Int'l*
7 *Association of Machinists*, 159 NLRB 137, 143 (1966); *Tetrad Co.*, 122 NLRB 203 (1959). If the
8 discharges of four or more of the discriminatees are found unlawful and those employees voted
9 in favor of the Union, then a majority of Respondents' employees will have voted for union
10 representation, and the Union will have won the election.

11
12 Second, as a matter of law, neither the relief sought here nor the relief sought in the
13 underlying administrative matter would "coerce" any "associational relationship." Petitioner is
14 not seeking an order requiring Respondents to recognize and bargain with the Union as the
15 collective-bargaining representative of any employees in the instant Petition for injunctive
16 relief.⁷ The instant Petition seeks only a requirement that Respondents cease and desist from
17 committing unfair labor practices (which are already prohibited under federal law) and
18 requirements that Respondents reinstate the unlawfully discharged employees, restore other
19 discriminatees to the terms and conditions of employment they enjoyed prior to discrimination
20 against them, expunge references to unlawful actions from their files, and take certain measures
21 to make employees aware of the Court's order. This relief is intended to restore employees'

22
23 ⁷ Although, in the underlying administrative matter, Petitioner is seeking a bargaining order with
24 respect to Respondents' warehouse technicians, that relief is not being sought in the instant
25 Petition, the warehouse technicians were not included in the agreed-upon voting group that voted
26 in the Board's election, and the bargaining order sought in the underlying administrative matter
requires a showing that, prior to Respondents' unfair labor practices, the Union attained majority
support among the warehouse technicians.

1 ability to freely choose whether to support the Union, in an atmosphere cleared of fear resulting
2 directly from Respondents' coercive and unlawful conduct.

3 4. Employees' Rights Outweigh the Speculative Harm Asserted By Respondents

4 Respondents also argue that the balance of equities weighs in their favor because granting
5 the requested injunctive relief would cause irreparable harm to their operations. Respondents
6 identify the following speculative, unsupported, and insufficient "harms" that they contend tip
7 the equities in their favor: (1) operational costs; (2) show quality and reputation; (3) the
8 replacement or voluntary resignation of current employees; and (4) speculation that reinstated
9 employees will engage in misconduct. As discussed below, Respondents' conjecture, even if
10 true, does not tip the scales of equity in their favor.

11 First, the Court, respectfully, should give little, if any, weight to Respondents' position
12 that reinstating employees, on an interim basis, would impose significant hardship because the
13 company would incur additional operating costs to retrain employees and restore working hours
14 that have since been cut. ECF No. 11 at 12. Respondents rely on an affidavit from Saxe on this
15 issue. However, although Saxe's affidavit states that the company would incur additional
16 retraining costs (RX 1 at 2), Respondents fail to show the amount of expected costs or that these
17 costs would be detrimental or even out of the normal course for Respondents' operations.⁸
18 Rather, Respondents simply describe these costs as "unnecessary." ECF No. 11 at 12. Thus, to
19 the extent that reinstating employees would affect Respondents' bottom line based on rehiring
20 and training the employees at issue, Respondents have failed to show a hardship.

22 Second, Respondents argue that reinstating the discharged employees will impose a
23 hardship in that their show quality and reputation will be ruined as a result. ECF No. 11 at 12.

24 ⁸ Notably, Respondents' operations have been characterized as having high turnover (up to 200
25 new employees per year), which requires on-the-job training. PX 81 at 4:7-21.

1 Respectfully, the Court should reject Respondents' position because it is premised on their own
2 pretextual version of events: that they had non-discriminatory reasons for the discharges.⁹

3 Third, Respondents argue that the relief sought would require them to displace current
4 employees with the interim reinstatement of the discharged employees, causing various
5 hardships. Respondents speculate that current employees may prematurely resign in the face of
6 an impending injunctive order, which would lead to an inability to complete performances and
7 shows even though Respondents must pay the performers regardless of whether the show goes
8 on. ECF No. 11 at 14. However, Respondents' position does not withstand scrutiny, as the
9 potential harms identified are vastly attenuated and improbable.

10 Moreover, requiring Respondents to offer the discharged employees interim
11 reinstatement would not necessarily require Respondents to displace current employees. To wit,
12 there is no evidence that the discharged employees were replaced by new employees. In fact,
13 Respondents' decision maker, Tiffany DeStefano (DeStefano), testified that many of the
14 employees were discharged as a result of Respondents' "restructuring plan" which was based on
15 more effective scheduling and having fewer employees do more. PX 47 32:2-21, 40:5-13; PX 64
16 5:21-6:22. Regardless, "to the extent [Respondents have] hired new workers, the rights of the
17 employees who were discriminatorily discharged are superior to the rights of those whom the
18 employer hired to take their places."¹⁰

19 Finally, Respondents provide various arguments targeting misconduct on the part of the
20 discharged employees to support their position of hardship weighing in their favor, implying that
21
22

23 ⁹ See *Frankl v. HTH Corp. (Frankl II)*, 693 F.3d 1051, 1066 (9th Cir. 2012) (rejecting
24 respondent's claim that being "forced to rehire a dishonest employee" was a hardship because
claim was "premised on its version of the events").

25 ¹⁰ *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988), overruled on other
26 grounds by *Miller v. Cal. Pac. Med. Ctr.*, 19F.3d 449 (9th Cir. 1994).

the employees will likely engage in further misconduct at Respondents' expense. For example, Respondents point out that some employees violated the administrative law judge's sequestration order.¹¹ ECF No. 11 at 12. Respondents also point out that discharged employee Alanzi Langstaff (Langstaff) is alleged to have engaged in "numerous altercations" with another employee.¹² ECF No. 11 at 13. These arguments should be rejected as a failed attempt to muddy the waters. The proposed order or imposition of interim reinstatement would not prevent Respondents from retaining their managerial right to discipline employees in a nondiscriminatory fashion where appropriate¹³. Thus, even if misconduct was inevitable – which is not the case – Respondents' responsibility to manage their workforce can hardly be weighted as a hardship that tips the equity scale in their favor.

Of note, Respondents give short shrift to the competing hardships at stake. Respondents, cursorily, disregard the interests of preserving "the national policy of encouraging collective bargaining, employee rights to choose union representation, and the NLRB's remedial power." ECF No. 11 at 11. In doing so, Respondents cite *Overstreet v. Gunderson Rail Svcs.*, 587 Fed. Appx. 379 (9th Cir. 2014), for the proposition that "such equities have less weight in this context because they can be vindicated after a final judgment." ECF No. 11 at 11. Respondents' reliance

¹¹ Notably, Respondents witnesses also violated the sequestration order, but to a far greater extent. Saxe provided DeStefano transcripts of other witnesses' testimony to review prior to testifying as Respondents' key witness during their case in chief. PX 102. The ALJ will resolve this issue when determining witness credibility.

¹² The "altercations" amount to an incident that occurred in August 2017 between Langstaff and a coworker, Ivan Barrera, the facts of which are discussed more fully below related to the likelihood of Petitioner's success on the merits of Langstaff's discharge. Interestingly, Respondents no longer contend that Langstaff's conduct was a reason for his termination, although Respondents' witnesses testified otherwise before the administrative law judge. See ECF No. 11 at 28 ("Langstaff was terminated for his repeated violations of the Attendance and Tardiness Policies").

¹³ See *Pye v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cr. 2001); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir.1996).

on *Gunderson Rail* for this broad proposition is erroneous. In that case, the issue was whether the district court abused its discretion in failing to adequately weigh the burden on the parties when imposing an order to reopen an entire railcar repair facility.¹⁴ The relief sought in this matter does not compare. Respondents' reliance on *Gunderson Rail* is an extreme overreach.

B. Petitioner Established Irreparable Harm of Employees' Statutory Rights

Respondents contend that Petitioner has failed to demonstrate the likelihood of irreparable harm absent injunctive relief. In doing so, Respondents argue that: (1) the Board's administrative process will provide an adequate remedy; (2) evidence fails to show diminution in support for the Union; and (3) Petitioner's "delay" undermines a showing of irreparable harm. ECF No. 11 at 15-17. As discussed below, the Court should, respectfully, find otherwise.

1. The Board's Remedy Will Be Wholly Undermined Without the Court's Intervention

In an effort to rebut Petitioner's showing of irreparable harm, Respondents attempt to show that the Board's normal course will soon provide an adequate remedy in this matter. Respondents contend that the Court should not ignore the Board's "ability to provide make-whole relief to any employee should the NLRB ultimately find violation of rights." ECF No. 11 at 15. Respondents further claim that because the issues will be "resolved in the immediate future by the administrative law judge," an adequate remedy exists. ECF No. 11 at 15-16.

Respondents' reliance on the Board's traditional make-whole remedy and the import of the administrative law judge's pending decision are red herrings. Respondents recognize that economic injury alone is insufficient to show irreparable harm. ECF No. 11 at 15. Respondents also concede that the instant petition is not premised on the Board's ability to provide a make-

¹⁴ *Gunderson Rail*, 587 Fed. Appx. at 381.

1 whole remedy.¹⁵ Confounding though, Respondents rely on the Board's ability to, at some later
 2 point, provide a make-whole remedy, as a means to undermine Petitioner's showing of
 3 irreparable harm. ECF No. 11 at 15. To show that a factor which is insufficient to meet a burden
 4 (i.e., economic injury), is present, is not a means to show that irreparable harm is not otherwise
 5 likely. Respondents miss the mark entirely and ignore the non-economic harms at stake.

6 Furthermore, Respondents' reliance on the pending administrative law judge's decision
 7 to rebut Petitioner's showing that irreparable harm is likely is misleading for several reasons.
 8 Respondents contend that the administrative law judge will "ultimately decide and resolve" the
 9 pending issues related to the outcome of the election and the discharged employees'
 10 reinstatement. ECF No. 11 at 15-16. Respondents also claim that the administrative law judge
 11 will resolve these issues "in the immediate future." ECF No. 11 at 15. However, as detailed at
 12 length in ECF No. 8, the process of briefing before the administrative law judge, issuance of an
 13 administrative law judge's findings and recommendations, briefing to the Board, issuance of a
 14 Board decision, and enforcement of a Board decision in a federal court of appeals will inevitably
 15 be a lengthy one, likely extending over the course of a year or more. And in the meantime,
 16 Respondents' unfair labor practices will reach fruition: the campaign or the Union's ability to
 17 garner support through the potential course of first contract bargaining will be irredeemable.
 18

19 2. Record Evidence and Controlling Precedent Support Finding Irreparable 20 Harm

21 In a further attempt to undermine Petitioner's showing of likely irreparable harm,
 22 Respondents claim that the supporting evidence is vague, speculative, and insufficient. ECF No.
 23 11 at 16. Absent from Respondents' discussion of the evidence is Petitioner's showing that after
 24 Respondents' discriminatory conduct of soliciting employees to participate in the March 13 stage

25 ¹⁵ Petitioner does not seek economic damages from this Court.
 26

1 repair project, authorizing the inexplicable wage increase on March 14, and discharging
 2 employees *en masse* shortly thereafter, the “record shows an observed drop-off in union activity,
 3 as evidenced by a decline in the number of union authorization cards signed and in attendance at
 4 union organizing meetings,” which strongly supports a finding of irreparable harm.¹⁶ Moreover,
 5 Respondents’ conduct in discharging the employees, itself, supports a finding that irreparable
 6 harm is likely.¹⁷ Accordingly, the Court should, respectfully, find that Petitioner has met the
 7 burden in showing the likelihood of irreparable harm.

8 3. Respondents’ “Delay” Argument is Meritless

9
 10 Finally, Respondents argue that Petitioner’s showing of likely irreparable harm is
 11 undermined by the “delay in seeking Section 10(j) relief.” ECF No. 11 at 16. As an initial matter,
 12 Petitioner did not delay in seeking injunctive relief, as detailed in ECF No. 8. Rather, Petitioner
 13 had been seeking authorization to file for injunctive relief since August and took reasonable steps
 14 given the additional charges filed and unanticipated evidentiary developments during the course
 15 of administrative hearing. See ECF No. 8 at 2-5. “[T]he Board needs a reasonable period of time
 16 to investigate and deliberate before it decides to bring a section 10(j) action.”¹⁸

17 Moreover, there is still an opportunity for this Court to return the parties to the *status quo*,
 18 and, thus, any perceived delay in the filing of the Petition should not weigh against a finding of
 19 irreparable harm.¹⁹ Interim reinstatement would restore the *status quo* insofar as “it would revive
 20

21 ¹⁶ *Overstreet v. Shamrock Foods Co.*, 679 Fed.Appx. 561, 565 (9th Cir. 2017); PX 42 (Affidavit
 of Union Organizer, Marielle Thorne).

22 ¹⁷ *Id.*; *Frankl I*, 650 F.3d at 1362.

23 ¹⁸ *Aguayo v. Tomco Carburetor Co.*, 853 F.2d at 750; *see also Garcia v. Fallbrook Hosp. Corp.*, 952
 F.Supp.2d 937, 955 (S.D. Cal. 2013).

24 ¹⁹ *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180 (9th Cir. 2011) (finding that delay did not
 25 undermine the Director’s irreparable harm argument because the Court could restore status of collective
 bargaining).
 26

the union’s organization campaign.”²⁰ Moreover, the relief sought will restore faith in the workforce that their rights to organize or support the Union will be respected, and protected. In the event that the Union is certified as Respondents’ employees’ collective-bargaining representative as a result of the underlying administrative proceedings, returning the discharged union supporters will “recreate the original status quo with the same relative position of the bargaining parties.”²¹ And, even if Respondents ultimately prevail in the election following the Board’s administrative proceedings, the reinstatement of union supporters would have otherwise revived the spark to unionize that Respondents stamped out before the election.

Waiting on a Board’s final determination in this matter will not be as effective because, by the time the Board order issues, the employees will have “observed that other workers who had previously attempted to exercise rights protected by the Act had been discharged and must wait . . . years to have their rights vindicated.”²²

C. Petitioner Established a Likelihood of Success on the Merits

Respondents argue that “injunctive relief must be denied because Petitioner fails to demonstrate a likelihood of success in establishing” Respondents’ unlawful conduct. ECF No. 11 at 18. In rebutting Petitioner’s showing a likelihood of success on the merits, Respondents ignore the applicable standard and merely set forth conflicting record evidence – often out of context –

²⁰ *Aguayo v Tomco Carburetor Co.*, 853 F.2d at 750.

²¹ *Frankl I*, 650 F.3d at 1362-1363.

²² *Silverman v. Whittal & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735 (S.D.N.Y. 1986). See also *Frankl I*, 650 F.3d at 1364 (“delay is only significant if the harm has occurred and the parties cannot be returned to the status quo or if the Board’s final order is likely to be as effective as an order for interim relief”); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1572-73 (7th Cir. 1996) (“Meanwhile, the employees remaining at the plant know what happened to the terminated employees, and fear it will happen to them”), *cert. denied*, 519 U.S. 1055 (1997); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 856 (5th Cir. 2010) (affirming injunction despite nineteen-month passage of time between initial complaint and 10(j) petition).

1 and iterate their pretextual justifications for their conduct. As discussed below, Petitioner has
 2 overwhelmingly met his burden before this Court.

3 1. Applicable Burden of Proof

4 Petitioner must show a likelihood of success on the merits. In other words, Petitioner
 5 must show a “probability that the Board will issue an order determining that the unfair labor
 6 practices alleged by the Regional Director occurred and that this Court would grant a petition
 7 enforcing that order, if such enforcement were sought.”²³ Petitioner meets this burden by
 8 “producing some evidence to support the unfair labor practice charge, together with an arguable
 9 legal theory.”²⁴ “Conflicting evidence in the record does not preclude [Petitioner] from making
 10 the requisite showing” for injunctive relief.²⁵ Additionally, “even on an issue of law, the district
 11 court should be hospitable to the views of [Petitioner], however novel.”²⁶

12 Finally, where, as here,²⁷ Petitioner “seeks and receives approval from the NLRB before
 13 filing a § 10(j) petition, the Director is owed special deference because likelihood of success is a
 14 function of the probability that the Board will issue an order determining that the unfair labor
 15 practices alleged by the Regional Director occurred.”²⁸ “That[the Board] itself decid[ed] to file a
 16 Section 10(j) petition might signal its future decision on the merits, assuming the facts alleged in
 17 the petition withstand examination at trial.”²⁹

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 19
 20
 21 ²³ *Frankl II*, 693 F.3d at 1062 (quotations omitted).

22 ²⁴ *Small v. Avanti Health Sys., LLC*, 661 F.3d at 1187 (quotations omitted).

23 ²⁵ *Frankl II*, 693 F.3d at 1063 (quotations omitted).

24 ²⁶ *Frankl I*, 650 F.3d at 1356.

25 ²⁷ See ECF No. 8; See also PX 103.

26 ²⁸ *Small v. Avanti Health Sys., LLC*, 661 F.3d at 1187 (quotations omitted).

²⁹ *Id.* (quotations omitted).

2. Respondents' Conflicting Evidence Does Not Preclude Petitioner's Showing of Likelihood of Success on the Merits

Respondents make the incredible claim that Petitioner has not presented any evidence of animus or prior knowledge of the union campaign. ECF No. 11 at 19. In doing so, Respondents ignore the facts, supported by record evidence, and theories set forth within Petitioner's initial filing, and, instead, focus on presenting conflicting record evidence to the Court. As discussed below, Petitioner has met the burden of producing some evidence to support the unfair labor practice charge, together with an arguable legal theory, and Respondents arguments do not overcome that showing and will not, ultimately, withstand scrutiny before the Board.

a. Petitioner Established Respondents' Knowledge

Petitioner will undoubtedly succeed on the merits insofar as proving Respondents' knowledge of employees' unionizing efforts prior to all of Respondents' unlawful conduct, including DeStefano and Saxe's decisions to discharge employees and grant wage increases. The Board finds that circumstantial evidence is sufficient to find knowledge, including evidence of suspect timing.³⁰ Here, Petitioner has presented an excessive amount of evidence, both direct and circumstantial, showing Respondents' knowledge of the campaign from early on. ECF No. 1, MPA at 3, 12, 16. Significantly, employees told supervisor Thomas Estrada (Estrada), who was admittedly involved in some of the decisions to terminate employees, about the union campaign as early as late February. ECF. No. 1, MPA at 3; PX 25 8:5-9:1. And, the timing in this case, including the near-simultaneous discharges of so many employees, leads to only one

³⁰ See, *Regional Home Care, Inc.*, 329 NLRB 85 (1999); *Matthews Industries*, 312 NLRB 75, 76-77 & n. 9 (1993); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Abbey's Transportation Services, Inc.*, 284 NLRB 698 (1987).

1 conclusion: that Respondents acted swiftly to quash the union effort soon after it was discovered
2 by Saxe, DeStefano, and others.³¹ ECF No. 1, MPA at 12.

3 Rather than directly address Petitioner's showing on this issue, Respondents simply
4 present the self-serving testimony from DeStefano and Saxe that they did not learn of the
5 campaign until after they coincidentally decided to discharge the most active employees in the
6 union effort. ECF No. 11 at 22. Such self-serving testimony is insufficient to rebut Petitioner's
7 strong showing of the likelihood of success.

8 In any event, the claims of DeStefano and Saxe are not supported by Respondents' own
9 witness' testimony. For example, Respondents claim that on April 10, 2018, their knowledge
10 was finally confirmed by the sighting of employee Graham passing out union literature in the
11 parking lot. ECF No. 11 at 22 (citing testimony from DeStefano, Saxe, and Estrada). However,
12 Estrada testified that this incident actually happened in February 2018, which is consistent with
13 employee Langstaff's testimony that Estrada warned him not to be seen with Graham in the
14 parking lot around that same time.³² PX 48 at 7-11; PX 30 at 4-5. Thus, even if Respondents'
15 cherry-picked evidence supported their own timing defense, it would be insufficient to preclude a
16 finding that Petitioner has shown a likelihood of success because the breadth of evidence shows
17 the Respondents learned of the campaign before they took action to quash it.
18

19 b. Respondents' "Scapegoat" Theory Fails to Undermine Petitioner's
20 Showing of Likelihood of Success on the Merits

21 In an effort to bolster their claims that they had legitimate reasons to discharge the nine
22 employees at the height of the union organizing drive, Respondents point the finger at their

23 ³¹ *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); *Greco &*
24 *Haines, Inc.*, 306 NLRB at 634.

25 ³² Notably, Respondents' exhibit with Estrada's testimony on this issue omits the answer to the
26 question of when the incident took place.

1 designated scapegoat, former manager, Jason Pendergraft (Pendergraft). Under Respondents'
2 theory, Pendergraft was the only one with authority to discipline and discharge employees and
3 continually failed to do so until he was discharged on February 21, 2018. ECF No. 19-21.
4 However, these contentions do not square with the facts.

5 First, Respondents contend that, after inheriting Pendergraft's duties, DeStefano was
6 "finally empowered to supervise" theater employees after Pendergraft's departure and, "[d]uring
7 the investigation of Pendergraft's misconduct," "discovered . . . numerous cases of employee
8 poor job performance and misconduct that Pendergraft allowed to take place or conceal from
9 Saxe." ECF No. 11 at 20-21. However, neither the record evidence nor inherent probabilities
10 square with this narrative. Rather, documents show that DeStefano had the authority to discipline
11 employees, and even acted upon that authority, prior Pendergraft's departure. See PX 82
12 (disciplinary and discharge forms created by DeStefano). Moreover, even according to
13 Respondents' own timeline, there are nearly four weeks between the time that DeStefano was
14 purportedly vested with authority to discharge employees and her finally doing so.
15

16 Second, even if Pendergraft was as derelict in his duties to discipline or discharge poor
17 performers, Respondents apparently tolerated this conduct for a year and five months³³ of his
18 employment. Further, Pendergraft was not fired for failing to properly supervise employees, but
19 for alleged theft and forgery. ECF No. 11 at 20. This evidence that Respondent long tolerated
20 alleged shortcomings as a supervisor and ultimately discharged him for other reasons shows that
21 Respondents' claims about his poor supervision are exaggerated, at best.

22 Third, Respondents fail to explain how an investigation into Pendergraft's alleged
23 embezzlement led DeStefano to "discover" the endless laundry list of misconduct and poor
24

25 ³³ RX 15.
26

1 performance that she later cited as reasons for ridding Respondents of known or suspected union
2 supporters. See PX 53 through PX 59. The inexplicability leads to the same finding that
3 Respondents' attempt to place blame on Pendergraft is merely a failed attempt cast doubt on the
4 most obvious reason for their actions – that they learned of the campaign and nipped it in the bud
5 by picking off the most ardent supporters.

6 Finally, Respondents' attempt to connect Pendergraft's misgivings with their decision to
7 discharge nine employees is, at best, evidence and a theory that conflict with Petitioner's. In light
8 of Petitioner's showing of likelihood of success on the merits, the Court should not, respectfully,
9 find that this conflicting evidence precludes a favorable finding.

10
11 c. Petitioner Established that Respondents were Unlawfully Motivated to
Discharge Employees and Reduce Working Hours

12 i. *Respondents' Proffered Reasons for Discharging Taylor Bohannon
13 and Nathaniel Franco are Pretext*

14 Respondents attempt to rebut Petitioner's showing of likelihood of success on the merits
15 related to their decision to discharge audio technicians Taylor Bohannon (Bohannon) and
16 Nathaniel Franco (Franco) by characterizing them as poor performers. However, as discussed
17 below, key elements in Respondents' narrative do not pass muster, and a host of other evidence
18 strongly supports a finding that Respondents' justifications are merely pretext.

19 With regard to Bohannon, Respondents claim that Saxe received several complaints
20 about her abilities as an audio technician just weeks before her termination. ECF No. 11 at 22.
21 However, Saxe's testimony shows that he was unsure of when he received the complaints. He
22 testified that Gerry McCambridge (McCambridge) initially complained about Bohannon in either
23 February or early March. RX 16 at Tr. 111. However, although McCambridge testified, he was
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1 unable to corroborate Saxe's timeline.³⁴ Regardless, even if McCambridge complained to Saxe in
2 February or early March, Respondents have not explained why they did not immediately
3 investigate Bohannon's purported performance issues or take corrective action. Indeed, even
4 crediting Saxe's testimony, Respondents inexplicably waited two weeks before investigating the
5 matter or discharging Bohannon. Again, the suspicious timing and lack of substantive
6 investigation support a finding that Respondents were motivated by the budding union campaign
7 and Bohannon's central role in it.³⁵

8 To further compound the showing of pretext related to Bohannon, internal emails show
9 that the decision maker, DeStefano, considered Bohannon "a great audio tech" as of March 1,
10 2018. PX 84. Even after DeStefano apparently started looking into Bohannon's performance
11 issues on March 15, DeStefano reported to Saxe that Bohannon was not "screwing up" but that
12 her performance was average. PX 57. Then, less than 12 hours later and within the succession of
13 emails laying the groundwork to discharge all of the other suspected union agitators, DeStefano
14 switched her tone and dramatically relayed to Saxe that the quality of the shows was at risk with
15 Bohannon running audio. PX 57 (email sent at 11:55 p.m.). Based on Respondents' shifting
16 evaluation of Bohannon's performance and the inexplicable timing of Respondents' decision to
17 discharge employees, *en masse*, Petitioner will likely succeed on the merits. Accordingly,
18 Respondents' attempt to portray their decision to discharge Bohannon as legitimate and lawful
19 fails to rebut Petitioner's showing.

20
21 Respondents' attempt to rebut Petitioner's showing of likelihood of success in
22 establishing that Franco's discharge was unlawful fails for similar reasons. Respondents have

23 ³⁴ McCambridge could not recall if it was before or after Bohannon took an extended medical
24 leave. PX 83 at 5-6.

25 ³⁵ *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d at 99; *Lucky Cab Co.*, 360 NLBR 271,
26 274-75 (2014)

presented evidence that they contend is consistent with their defense that Franco was discharged due to performance issues. Respondents contend that Petitioner's showing of animus is undermined by the fact that Franco was identified as a poor performer throughout his tenure. ECF No. 11 at 23. However, Petitioner's showing of animus is only bolstered by Respondents' concession. According to Respondents, Franco's alleged performance issues were tolerated for over three months. Respondents' failure to explain their sudden desire to cut him loose, at the same time Respondents decided to discharge the other known union organizers, supports a finding that Respondents' decision was motivated by animus, and that their reasons are pretext.³⁶

Moreover, Respondents have provided shifting reasons for discharging Franco. On March 14, the day before DeStefano sent Saxe the final email documenting the reasons for terminating Franco, DeStefano told Saxe she was going to discharge Franco because she was eliminating his swing position, consistent with the "restructuring" justifications heard by other employees. See ECF No., 1 MPA at 5. In response, Saxe emphasized that the documented reason should be performance based, while opining that her reason may present issues under labor laws should the company hire someone else in the same position that had been eliminated. PX 85 at 2-3. These communications further support a finding that Respondents provided shifting reasons in an attempt to mask their unlawful motivation, again, showing unlawful motivation and supporting Petitioner's likelihood of success on the merits.³⁷

³⁶ *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86, 90-91 (3rd Cir. 1942); *Tres Estrellas de Oro*, 329 NLRB 50, 58 (1999); *PVM I Associates, Inc.*, 328 NLRB 1141, 1152-53 (1999); *Alco Electric Co., Inc.*, 258 NLRB 819, 822 (1981).

³⁷ See, e.g., *Lucky Cab Company*, 360 NLRB at 274; *ManorCare Health Services – Easton*, 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.*, 306 NLRB at 634; *Wright Line*, 251 NLRB 1083, 1088 n. 12 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-57 (1994), *enfd. sub nom.*, *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997).

1 In sum, the arguments advanced by Respondents concerning the discharges of Bohannon
2 and Franco serve only to show that the asserted reasons for the discharges are pretext and
3 therefore only serve to promote Petitioner's likelihood of success.

4 *ii. Respondents' Proffered Reasons for Discharging Alanzi Langstaff,*
5 *Jasmine Glick, and Kevin Michaels are Pretext*

6 Respondents attempt to rebut Petitioner's showing of likelihood of success related to their
7 decisions to discharge employees Alanzi Langstaff (Langstaff), Jasmine Glick (Glick), and
8 Kevin Michaels (Michaels) is similarly flawed. Respondents characterize this group of
9 employees being discharged for attendance issues and violating other policies as a means to set
10 forth legitimate, and lawful, reasons for their conduct, while also relying on their contention that
11 Respondents were unaware of the union activity bursting throughout the theaters. ECF No. 11 at
12 25-28. However, as discussed above and throughout Petitioner's MPA, Respondents' prior
13 knowledge is well-established. Furthermore, in a case such as this, where strong evidence of
14 pretext supports a finding of animus, Respondents' burden in showing that they would have
15 taken the same action regardless of the protected activity at issue, is substantial.³⁸ As discussed
16 below, Respondents will be unable to make such a showing.

17 Respondents claim that Langstaff was discharged "for his repeated violations of the
18 Attendance and Tardiness Policies." ECF No. 11 at 28. Notably, although Respondents have
19 apparently now limited the basis of Langstaff's discharge to attendance issues before this Court,
20 the administrative record is filled with testimony and documents showing that Respondents'
21 asserted reasons, at some point, went well beyond. In fact, in documenting the reasons for
22 Langstaff's termination, Respondents took the shotgun approach, citing work ethic, laziness,
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25 ³⁸ *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 5 (2016); *Case Farms of N.*
26 *Carolina, Inc.*, 353 NLRB 257, 259 (2008).

1 poor job performance, attitude, arguments with coworkers, complaining about favoritism, and
2 tardiness. PX 34; PX 53. Saxe even testified that Langstaff was discharged for getting in a
3 fistfight, which is a wholly unsupported fabrication. PX 86 at 3:21-4:25. To add to the scattershot
4 reasons for Respondents' decision to discharge Langstaff, Human Resource Manager Takesha
5 Carrigan (Carrigan) and DeStefano told him that it was due to "restructuring" and that
6 Respondents were going to bring in stagehands from an "outside source." PX 30 at 15:10-16:23.
7 These exaggerated, shifting, numerous, and fabricated reasons strongly show animus and
8 pretext.³⁹ Moreover, even if Respondents' reasons rang true, Langstaff worked for Respondents
9 for over a year, and Respondents' tolerance of Langstaff's alleged misconduct during that time
10 raises even more suspicion about the timing of his discharge, further supporting a finding of
11 unlawful motivation.⁴⁰

12
13 Respondents claim that Glick was discharged for attendance issues and using her cell
14 phone in violation of company policy. ECF No. 11 at 25-26. Similar to Langstaff, DeStefano
15 documented a host of other reasons for Glick's discharge, mostly centered on her attitude. For
16 example, within DeStefano's parade of emails on March 15 to Saxe (see ECF No. 1, MPA at 5;
17 PX 53 through 59), DeStefano described Glick as "a bit of a cancer around here with her attitude
18 and mouth." PX 54. DeStefano also cited Glick's criticism of management and the company as a
19 reason to discharge her. PX 54. DeStefano was concerned that Glick's attitude was "spreading to
20 other employees." PX 54. Not only does the use of such veiled language indicate anti-union
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23 ³⁹ See, e.g., *Lucky Cab Company*, 360 NLRB at 274; *ManorCare Health Services – Easton*, 356
24 NLRB at 204; *Greco & Haines, Inc.*, 306 NLRB at 634; *Wright Line*, 251 NLRB at 1088 n. 12,
citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d at 470; *Cincinnati Truck Center*, 315 NLRB
at 556-57.

25 ⁴⁰ *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d at 90-91; *Tres Estrellas de Oro*, 329 NLRB
26 at 58; *PVM I Associates, Inc.*, 328 NLRB at 1152-53; *Alco Electric Co., Inc.*, 258 NLRB at 822.

1 animus,⁴¹ but it also showcases Respondents' shifting reasons for discharging Glick, thus
2 underscoring Petitioner's likelihood of proving animus and pretext.

3 There is additional evidence showing pretext related to Respondents' reasons to
4 discharge Glick. For example, DeStefano informed Glick that she was discharged due to
5 restructuring and that Respondents would be using a third party, showing yet another reason for
6 Glick's discharge. PX 24 at 13:15-14:18; PX 36 at 33, 35. By way of another example,
7 Respondents' termination form does not mention cell phone policy violations or attendance
8 issues. Rather, the form documents Glick's "long history of insubordination," even though there
9 is no evidence that Glick engaged in insubordination. PX 34. Again, Respondents' scattershot,
10 shifting, and unsupported reasons for discharging Glick support a finding of animus and pretext.
11 Between this and the inexplicable timing of Glick's discharge, Respondents will be unable to
12 meet their substantial burden in showing that they would have discharged Glick regardless of her
13 union activity.⁴²

14
15 Similarly, Respondents claim that stagehand Michaels was discharged for attendance
16 issues. Respondents contend that Michaels "exhibited consistent poor attendance, as well as
17 substandard job performance and insubordination," during his employment tenure (which began
18 in 2015). ECF No. 11 at 26. Respondents' identify the "final straw" as Michaels' refusal to
19 comply with his assigned schedule. ECF No. 11 at 26-27. In support of their position,
20 Respondents rely on evidence showing that Michaels clocked in early on some days and clocked
21 out late on other days. However, although Respondents contend that Michaels' conduct occurred
22 in February and early March, Michaels testified that he had a practice, beginning before Estrada

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24 ⁴¹ See *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 400 (4th Cir. 1991); *Promenade*
Garage Corp., 314 NLRB 172, 179-180 (1994); *Cook Family Foods*, 311 NLRB 1299, 1319
(1993); *McCotter Motors Co.*, 291 NLRB 764, 771 (1988).

25 ⁴² *Lucky Cab Company*, 360 NLRB at 274.
26

1 even became the supervising stage manager in 2017, to come in early to perform a regular
2 routine of helping set up for the show. Michaels also explained that he would often stay late after
3 speaking with Estrada to perform work calls to make sure he worked enough hours to be
4 considered full-time. PX 87 at 9:6-24. This testimony shows Michaels' conduct could hardly be
5 viewed as a "final straw," when he had been doing the same thing for at least a year before.
6 Furthermore, even if Michaels' deviated from DeStefano's schedule, his conduct was tolerated
7 and condoned by his supervisor, Estrada, which undermines Respondents' defense and evidences
8 animus and pretext.

9
10 Furthermore, similar to the others, Respondents have cited additional reasons for
11 Michaels' discharge which will likely support a finding of animus and pretext. For example,
12 DeStefano asserted in her email to Saxe that Michaels' attitude was a problem and that he was
13 unwilling to learn other tracks. DeStefano expressed concern that Michaels' attitude was
14 spreading to others. PX 56. Again, Respondents' additional reasons and veiled language support
15 a finding of animus.⁴³ Moreover, Michaels testified that he was willing to learn other tracks and
16 actually suggested to Estrada that all the stagehands, including himself, learn every track on one
17 of the shows. PX 87 at 6:18-7:21. Thus, Respondents' additional reason does not add up, further
18 supporting a finding of pretext.

19 Respondents have also given additional performance based reasons for their decision to
20 discharge Michaels. Estrada, who testified that he recommended Michaels' termination, did not
21 mention anything related to attendance. Rather, Estrada testified that he recommended Michaels'
22 discharge because Michaels was angry, missed cues, and took too long to finish painting some
23

24 ⁴³ See *NLRB v. Hale Container Line, Inc.*, 943 F.2d at 400 ; *Lucky Cab Company*, 360 NLRB at
25 274; *Promenade Garage Corp.*, 314 NLRB at 179-180 (1994); *Cook Family Foods*, 311 NLRB
26 at 1319 ; *McCotter Motors Co.*, 291 NLRB at 771.

1 stairs. Estrada summarized, saying that Michaels’ “performance was bad.” PX 88 at 3. Thus,
2 again, Respondents’ scattershot and inconsistent reasons illustrate their blatant pretext,
3 precluding their ability to show that it would have discharged Michaels regardless of his
4 protected activity.

5 *iii. Respondents’ Proffered Reasons for Discharging Zachary Graham are*
6 *Pretext*

7 In an effort to rebut Petitioner’s showing of likelihood of success on the merits related to
8 their decision to discharge long-term employee Zachary Graham (Graham),⁴⁴ Respondents, as
9 with all other allegations, argue that Petitioner is unable to show Respondents were aware of the
10 union activity and that their decision was premised on “legitimate business purposes that would
11 have compelled termination . . . regardless of any alleged protected activity.” ECF No. 11 at 30.
12 Remarkably, Respondents also argue that because Graham was terminated for job abandonment,
13 Petitioner is unable to even show that Respondents took adverse action against him. ECF No. 11
14 at 30. As discussed below, Respondents’ position should, respectfully, be rejected.

15 To be sure, Respondents took adverse action against Graham when DeStefano texted him
16 on March 21 to inform him that he was “termed a while ago for job abandonment and failure to
17 comply with the company policies [and] procedures.” PX 66. Respondents’ attempt to show that
18 Graham, in fact, abandoned his job (i.e., quit) is belied by: (1) Graham’s response to DeStefano’s
19 text message indicating that he intended to start working again in a couple of weeks (PX 66), (2)
20 the fact that Graham often came to the theaters and spoke with supervisors and his coworkers
21 while he was injured (PX 25 at 11-13; PX 26 at 5-7; PX 30 at 4-6), and (3) DeStefano’s admitted
22 knowledge that Graham’s injury required surgery (ECF No. 11 at 29). In fact, Respondents
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25 ⁴⁴ Graham worked for Respondents for three and a half years. PX 34.
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1 discharged Graham because he engaged in union activity at Respondents' facility as supported
2 by the evidence presented by Petitioner here.

3 As to Respondents' knowledge of Graham's protected activity, Estrada admitted that he
4 saw Graham, as early as February, passing out union cards. PX 48 at 7-11. Respondents' focus
5 on their conflicting evidence – self-serving testimony that DeStafano and Saxe did not know
6 about the campaign until April – is insufficient to rebut Petitioner's showing on this issue.
7 Moreover, as discussed herein and throughout Petitioner's MPA, knowledge is overwhelmingly
8 shown through direct and circumstantial evidence. ECF No. 1, MPA at 3, 12, 16.

9 Furthermore, Respondents' contention that it would have discharged Graham regardless
10 of any protected activity is untenable in light of Petitioner's showing that Respondents' decision
11 was steeped in pretext. First, Respondents claim that Estrada and DeStefano tried to contact
12 Graham for months to no avail. ECF No. 11 at 29-30. In support of their position, Respondents
13 point out evidence that merely conflicts with Petitioner's: namely, testimony from DeStefano
14 stating that she and Estrada tried to reach Graham since about February 24, but Graham never
15 responded. ECF No. 11 at 29. Consistent with her testimony, DeStefano's email documenting the
16 reasons for discharging Graham states that he had not returned text messages or phone calls for
17 weeks. PX 67.

18
19 However, Graham's testimony, which is consistent with documentary evidence, shows
20 that DeStefano's claim is patently false. For example, Graham testified that he never received
21 any text messages or missed any calls from DeStefano. His testimony is consistent with the
22 screen shot of his text messages from DeStefano showing that prior to March 21, the last
23 message he received was February 24. PX 66. And, although the February 24 message from
24 DeStefano was a request to send a doctor's note, emails indicate that Graham updated DeStefano
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1 on his condition and sent a doctor's note to her on February 26, and even offered to report to
2 work on February 28, despite his injury. PX 89. Additionally, phone records do not show any
3 telephone calls from DeStefano to Graham while he was injured, nor did Respondents provide
4 any evidence corroborating DeStefano's claim that she ever attempted to reach him. *Compare*
5 PX 66 (DeStefano's phone number) *with* PX 90.

6 Moreover, although Respondents point out that Graham had not provided updated
7 medical documentation, Graham testified that he spoke with DeStefano on February 28 at the
8 theater (the same day he pitched Estrada on the benefits of unionizing). Graham asked DeStefano
9 about what he needed to provide with regard to FMLA documentation. DeStefano responded that
10 he did not need to worry about it and that he would have a job when he was healed. PX 25 at 7:2-
11 11:4. Thus, DeStefano's claim that she discharged Graham because she never received the
12 requisite documentation, despite evidence showing otherwise, further supports a finding of
13 animus and pretext in this matter. Accordingly, Petitioner has met his burden in showing a
14 likelihood of success on the merits with regard to Graham's discharge.
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16 *iv. Respondents' Proffered Reasons for Discharging Leigh-Ann Hill are*
17 *Pretext*

18 With regard to Leigh-Ann Hill's (Hill) discharge, Respondents attempt to rebut
19 Petitioner's showing of likelihood of success on the merits by presenting conflicting evidence,
20 while arguing, again, that Petitioner has not shown knowledge and that their discharge decision
21 was compelled for legitimate reasons. ECF No. 11 at 31-32. As discussed below, Petitioner has
22 met his burden in presenting some evidence, consistent with a legal theory, to support a
23 favorable finding.

24 First, Respondents contend that Petitioner failed to show that they knew of Hill's
25 protected activity. ECF No. 11 at 31. Respondents' sequence of events differs slightly from
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1 Petitioner's, but it is undisputed that Hill spoke with DeStefano on March 1. Hill requested a few
2 days off to work an upcoming side job. Petitioner's evidence shows that DeStefano granted the
3 request.⁴⁵ PX 27 at 8:18-9:8. Although Respondents claim that Hill started screaming at
4 DeStefano while asking if she was going to be fired, Petitioner's evidence tells a different story.
5 Hill testified that after DeStefano granted her request for time off, Hill raised several growing
6 concerns about the working conditions at the theaters. Hill complained about the wages and
7 criticized the owner, Saxe, by saying that Saxe expected perfection from employees but was not
8 willing to pay for it. Then, Hill raised issues with not having the right tools to perform her job.
9 DeStefano responded telling her to be patient. Hill grew more frustrated because she had been
10 seeking better tools to do her job for quite some time and was often brushed off. PX 27 8:8-
11 10:23. Hill, admittedly, used foul language while addressing these concerns with DeStefano, but
12 Respondents do not cite that conduct as the basis for their decision.

14 Raising concerted complaints about wages, as Hill did, is protected activity for which
15 Respondents were aware of.⁴⁶ DeStefano's statement relaying the reasons for Hill's termination
16 support Hill's testimony on this issue. PX 38 at 3 (stating that Hill "came in screaming about her
17 pay and this company"). Because Hill made the complaints to DeStefano, Petitioner has easily
18 shown a likely favorable finding on the issue of knowledge.

19 Moreover, there is evidence supporting a finding that employee Kostew likely disclosed
20 to her boyfriend, Stage Manager Estrada, the union activity simultaneously unfolding on the
21 Facebook group chat that same day. That night, on March 1, Kostew publicized similar fears of
22 losing her job because of the union campaign to those that she later disclosed in a text message

23 ⁴⁵ Respondents claim that DeStefano warned Hill about maintaining her schedule, rather than
24 oblige the request. ECF No. 11 at 31.

25 ⁴⁶ *Avery Leasing, Inc.*, 315 NLRB 576, 580 fn. 5 (1994); *Enterprise Prods.*, 364 NLRB 946
26 (1982).

1 as stemming from Estrada's warning. PX 36 at 25 (Kostew stating, "I'm just worried. I really
2 can't afford to be fired"); PX 45 at 1 (Kostew stating that Estrada "said the other few times there
3 have been union possibilities everyone involved was fired and I really cannot afford to lost this
4 job"). As the group conversation unraveled through Facebook, Kostew and Hill argued about
5 their pay, benefits, and skillsets, which led to Hill removing Kostew from the group altogether.
6 PX 36 at 25-29. Hill was discharged the very next day, which leads to an inference that Kostew,
7 having been shunned by the group, blew the whistle on the campaign, including Hill's
8 involvement with it. This theory is also supported by Respondents' decision to promote Kostew
9 in the coming weeks to cue caller, as an apparent reward, and Respondents' decision to increase
10 wages just as Kostew expressed it should within the Facebook chat group. See PX 36 at 28.
11 Accordingly, based on the above, and all the other evidence showing that Respondents'
12 supervisors learned about the campaign as early as February, Petitioner has shown a likelihood
13 of success with regard to a finding of prior knowledge.

15 Second, Respondents assert that Hill was discharged for a legitimate purpose in an effort
16 to undermine Petitioner's showing that Respondents were unlawfully motivated. ECF No. 11 at
17 31-32. Respondents claim that Hill was discharged "because she could no longer fulfill her
18 obligations as a full-time employee and was unable to offer a consistent schedule." ECF No. 11
19 at 31. However, mounting evidence supports a finding that Respondents' reason is pretext. For
20 example, DeStefano's statement, drafted for HR Manager Carrigan documenting the reasons for
21 Hill's discharge, include conduct dating back to 2017 unrelated to the scheduling issues later
22 cited by Respondents. PX 38. Additionally, Respondents' original termination form states that
23 Hill was discharged for "poor attitude," while another version, prepared in anticipation of
24 litigation, includes the additional reason of "secondary employment." *Compare* PX 34 with PX
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40. PX 91 at 3-5. These shifting reasons support a finding that Respondents were unlawfully motivated and that Respondents' proffered justification amounts to pretext. Accordingly, Petitioner has set forth evidence showing a likelihood of success on the merits related to Hill's discharge.

v. Respondents' Proffered Reasons for Discharging Chris Suapaia are Pretext

Respondents attempt to rebut Petitioner's showing of likely success on the merits related to stagehand Chris Suapaia by presenting their reasons for discharging him. As discussed below, Respondents' justifications for discharging Suapaia do not withstand scrutiny.

The evidence of pretext, highlighting Respondents' unlawful motivation, is stunning in this instance. Respondents claim that Suapaia was discharged for having limited availability, "as well as his lack of willingness to execute shows." ECF No. 11 at 32. In support of their position, Respondents rely on DeStefano's testimony showing that Suapaia was unable to run tracks for certain shows and that he would request time off, exceedingly. With regard to not being willing to run certain tracks, Respondents claim that it was due to Suapaia's "fear of walking backward, which fear impeded the moving of props on the stage, rendering his service *useless*." ECF No. 11 at 33 (emphasis added). Similarly, Suapaia's termination form states, in part: "We try and teach new tracks and he can't walk backwards and always has an excuse." PX 34; see also PX 55 (March 15 email citing "fear of tripping").

Just as Respondents' narrative suggests, DeStefano emphasized throughout her testimony that Suapaia's limitations were the result of his "fear" of walking backwards, rather than his physical disability. PX 92 at 3-5. As evidence shows, Suapaia has a physical disability stemming from a 2015 accident. He is unable to walk backwards with speed, while carrying things such as props. PX 29 at 12:8-13. When he worked with Stage Manager Steve Sojack (Sojack) in late

1 2017, Sojack learned about Suapaia's physical limitations and accommodated him. But after
2 observing Suapaia limping at times, Sojack raised his concern with DeStefano and other
3 supervisors during a Stage Manager meeting, about whether the particular shows at his theater,
4 given the physical nature of those shows, were the right fit for Suapaia. Shortly thereafter,
5 Suapaia was transferred to work on a different show. PX 93 at 4-5, 14-17. Notably, when
6 DeStefano fired Suapaia, she told him that one of the reasons was because Sojack told her that he
7 was "unable to move backwards." PX 29 at 11:7-10.

8
9 Based on the above, DeStefano's reliance on Suapaia's disability as a reason for this
10 termination should be considered evidence of pretext for a myriad of reasons. For starters, the
11 underlying facts involving Sojack date back months before Suapaia was even discharged, which
12 indicates that DeStefano was attempting to pile on any imaginable reason. Also, Respondents
13 had a history of accommodating Suapaia's disability and provided no reason why, suddenly, they
14 could no longer do so. Furthermore, the stunning admission that Respondents discharged Suapaia
15 because of his disability indicates that, in haste, DeStefano put forward one unlawful
16 discriminatory reason to mask another. Moreover, DeStefano's characterization of Suapaia's
17 disability as a "fear" only highlights DeStefano's propensity to stretch the truth, which, again,
18 supports a finding that Respondents' reasons for discharging Suapaia are pretext. As such,
19 Respondents will be unable to show that they would have discharged Suapaia regardless of the
20 union campaign, and Petitioner has shown an overwhelming likelihood of success on the merits.

21 *vi. Respondents' Proffered Reasons for Discharging Michael Gasca are*
22 *Pretext*

23 Respondents attempt to rebut Petitioner's showing of a likelihood of success on the
24 merits with regard to their decision to discharge stagehand Michael Gasca (Gasca) by denying
25 knowledge of any protected activity, and presenting evidence supporting their reason to
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1 discharge him. In support of their position, Respondents claim that Gasca was discharged
2 because he complained about his working conditions and was a poor performer. ECF No. 11 at
3 33-34. Respondents further contend that the decision was based on their plan to restructure the
4 operations which eliminated the need for on-call employees. ECF. No. 11 at 34. Respondents'
5 assertions related to Gasca are not only factually inaccurate, but fail to overcome Petitioner's
6 showing of unlawful motivation. As discussed below, Petitioner has shown that Respondents
7 were aware of, or at least had reason to suspect, that Gasca engaged in protected activity.
8 Moreover, Respondents' attempt to cloak their decision in legitimate reasons fails to overcome
9 Petitioner's evidence showing animus and pretext.

10 Respondents assert that Gasca, since the time he was hired, was one of only two on-call
11 employees. ECF No. 11 at 33-34. This is inaccurate. Gasca was hired in 2016 as a stagehand. He
12 worked part-time for Respondents until January 2018, when he changed to an on-call employee.
13 The change was a result of a compromise stemming from Gasca's request to take a two-month
14 leave of absence to pursue a union apprenticeship program. Respondents would not allow him to
15 take the leave of absence, but instead agreed to let him work on-call. From January until the time
16 he was discharged, at the same time as the other employees in March, Gasca fulfilled on-call
17 duties filling in for other stagehands as needed. PX 28 at 4:1-9; 5:24-13:11.

18 As further background, shortly before he was discharged, Gasca was accepted to the
19 union apprenticeship program that he had been pursuing since January, while working on-call.
20 Once he was accepted, he informed all of the stage managers. At that point, Gasca also requested
21 to work more hours again at the theaters given the change in commitments with the
22 apprenticeship program. He eventually made that request to DeStefano soon before she fired
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1 him. PX 28 at 13:20-19:16. By chance, his acceptance into the union apprenticeship program
2 coincided with the union campaign that was at the helm.

3 Respondents' proffered reasons for discharging Gasca include: (1) poor performance, (2)
4 complaining, and (3) the elimination of on-call stagehands. ECF No. 11 at 34; PX 58. All of
5 these reasons have been shown as pretext. First, Respondents are unable to show that poor
6 performance was the catalyst for their decision. Rather, the evidence shows that even if Gasca
7 made mistakes during his last on-call performance, it was weeks before Respondents decided to
8 discharge him (PX 58), which indicates that any perceived performance issues were not the true
9 basis. Furthermore, Stage Manager Sojack testified that Gasca's performance varied throughout
10 his entire tenure of employment as far as missing cues at times. PX 93 at 19-20. Thus, to the
11 extent Respondents relied on performance issues to justify their decision to discharge Gasca,
12 Respondents tolerated the performance issues for over a year and has failed to explain why, in
13 the midst of the union campaign, the performance issues demanded discharge. This shows
14 pretext.⁴⁷

16 Second, Respondents cite additional protected activity – complaining about wages and
17 the company – as another reason for Gasca's discharge. Although Respondents contend that it
18 was not the complaining itself, but the consequential lack of productivity that was a problem
19 (ECF No. 11 at 34), documents show otherwise. DeStefano's March email related to Gasca,
20 documenting the reasons for his termination, states: Gasca "has once [sic] of the worst attitudes
21 of anyone I ever worked with. Constantly complaining about his pay and his hours and all the
22 times he has 'busted his a**' for this company with no appreciation." PX 58. Further, his
23 termination form provides that "his attitude was awful and he was always complaining about
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25 ⁴⁷ *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d at 90-91; *Tres Estrellas de Oro*, 329 NLRB
26 at 58; *PVM I Associates, Inc.*, 328 NLRB at 1152-53; *Alco Electric Co., Inc.*, 258 NLRB at 822.

1 hours/pay.” PX 34. Not only are employee complaints about working conditions protected, but
2 DeStefano’s references to his attitude support a finding of veiled language targeting protected
3 activity.⁴⁸ Moreover, none of these documents suggest that his lack of productivity was the issue,
4 which undermines DeStefano’s testimony cited by Respondents. ECF No. 11 at 34. These
5 shifting reasons and references to Gasca’s attitude provide further evidence of pretext.

6 Third, Respondents’ claim that Gasca’s discharge was the result of their decision to
7 eliminate on-call positions is flawed. In an attempt to show that Gasca was not the only on-call
8 employee who suffered discharge because of their decision, Respondents point to another on-call
9 employee, Kostynty Melnichenko, whose position was also purportedly eliminated. ECF No. 11
10 at 33-34. However, the other on-call employee was not discharged as a result of Respondents’
11 so-called restructuring decision to eliminate on-call positions. In fact, personnel records show
12 that the other employee quit and had not worked since September 2017. PX 94. Moreover, just
13 prior to his discharge, Gasca requested to have more, regular hours. So, even if Respondents
14 were truly eliminating on-call positions, they could have granted his request and scheduled him
15 part-time, consistent with his schedule prior to his pursuit of the union apprenticeship program.
16 Thus, again, Respondents’ justification will likely be seen as a failed attempt to cover up their
17 unlawful motivation. In other words, Respondents’ proffered reasons are pretext, and insufficient
18 to show that they would have discharged Gasca – or any of the others – regardless of the union
19 campaign or other protected activity. Accordingly, Petitioner has shown a likelihood of success
20 on the merits.
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24 ⁴⁸ ⁴⁸ See *NLRB v. Hale Container Line, Inc.*, 943 F.2d at 400; *Promenade Garage Corp.*, 314
25 NLRB at 179-180 ; *Cook Family Foods*, 311 NLRB at 1319 ; *McCotter Motors Co.*, 291 NLRB
26 at 771.

vii. Respondents Proffered Reasons for Reducing Employees' Hours and Disciplining Scott Tupy are Pretext

Petitioner has shown a likelihood of success on the merits regarding allegations that Respondents reduced employees' working hours, created more onerous working conditions, and issued discipline to employee Scott Tupy, in connection with the reduction of hours, as a result of their union sympathies. ECF No. 1, MPA at 17-18. Respondents concede that they reduced Darnell Glenn and Tupy's hours, and disciplined Tupy, but assert that their decisions were based on legitimate business reasons. ECF No. 11 at 35-36. Although Respondents have not expressed their position in such terms, Respondents' defense is an attempt to undermine Petitioner's showing that Respondents' decisions were motivated by animus and pretext.

Regarding the reduction in hours, Respondents focus on their decision to begin assigning work calls to full-time employees, rather than part-time employees. ECF No. 11 at 36-37. However, this is not the reduction of hours at issue here. At issue is Respondents' decision to start scheduling Glenn and Tupy, on about June 1, 2018, to begin their show calls at 8:00 p.m., rather than 7:30 p.m.⁴⁹

As background, Glenn works as an audio technician and Tupy is a lighting technician. They both work on the same show. Prior to the change, Glenn and Tupy would begin setting up their equipment thirty minutes before the sound check, which occurs at 8:00 p.m. As a result of the scheduling change, Glenn and Tupy were to arrive at the same time as the sound check, making it impossible for them to prepare their equipment before sound check or the start of the show. PX 32 at 21:24-32:25; PX 33 at 21:4-23:25; PX 104. Based on the impossible task of

⁴⁹ Respondents tacitly describe a 15 minute change in the show call start time. ECF No. 11 at 37, without providing any explanation for it. As discussed above, this 15 minute change Respondents refer to is likely the compromise DeStefano worked out with Tupy, after he was disciplined. See PX 96.

1 starting their shift at the same time as sound check and for the integrity of the show, Tupy
2 continued to show up early to make sure his equipment was ready. On June 20, 2018,
3 Respondents' disciplined him for this, despite Tupy's explanation of why it was necessary for
4 him to come in early, which prompted DeStefano to admit that the 8:00 p.m. start time was
5 unworkable. PX 75; PX 95; PX 96. Going forward, DeStefano changed the start time to 7:45
6 p.m. PX 33 at 23; PX 96.

7 Notably, the scheduling change happened shortly after Tupy vehemently spoke out
8 during Respondents' anti-union meetings on May 15, the same day that Saxe told Tupy and
9 Glenn that he knew they supported the Union.⁵⁰ See ECF No. 1, MPA at 7. This timing supports
10 a finding that Respondents were motivated by anti-union animus in changing the schedules of
11 Tupy and Glenn in such a way that, admittedly, made their jobs impossible to perform. PX 95.
12 Moreover, Respondents have failed to provide any explanation or defense for their decision to
13 change the show call start time as they did. In fact, there is no legitimate explanation. If
14 DeStefano was motivated by the maintaining the integrity of the shows, as she melodramatically
15 proclaimed in her emails to justify discharging eight employees, *en masse*, then she wholly failed
16 in that endeavor by putting Glenn and Tupy in a position where their equipment was not ready at
17 the start of a show. Rather, DeStefano's decision to change their schedules in such a way shows
18 that she was setting them up to fail or simply making their tasks more difficult under wildly
19 unrealistic terms. Accordingly, record evidence, including the inexplicable nature of
20 Respondents' decisions, supports a finding of pretext, thus bolstering Petitioner's showing of a
21 likelihood of success on the merits.
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24 ⁵⁰ As noted above in Section II.A.2, Respondents presented a one page transcript citation in an
25 attempt to show that Tupy directly disclosed his union support prior to Saxe saying as much. If
26 anything, this is merely conflicting evidence related to the allegation that Saxe created the
impression that he was keeping track of, or surveilling, employees' union sympathies.

viii. *Respondents' Proffered Reasons for their Actions Against Stephen Urbanski are Pretext and Relief is Necessary Despite His Employment Status*

Respondents contend that there are legitimate, lawful explanations for their conduct toward employee Stephen Urbanski (Urbanski). Respondents also claim that any relief related to Urbanski would be improper given that he has apparently stopped working for the company. ECF No. 11 at 37-38. However, as discussed below, Respondents' proffered reasons for their conduct do not pass muster, in light of Petitioner's showing that Respondents' treated Urbanski differently as a result of his participation in the election on the Union's behalf. Moreover, even if Urbanski no longer works for Respondents, Respondents' conduct toward him ought to be remedied so that all employees are assured that their rights are protected.

Petitioner's evidence shows that Urbanski worked as a lighting technician, performing maintenance on lighting equipment outside of show times. At the time of the election, May 17, 2018, Urbanski was on medical leave due to a workplace injury. But, on behalf of the Union, he was designated to observe the election process, which Respondents learned. Shortly thereafter, Urbanski informed Respondents that he was prepared to start working on light duty as of June 4, 2018. PX 76. However, even though Respondents had offered him light duty prior to the election, Respondents stopped making such offers since about May 21 through the time he was released to full-duty on June 21,⁵¹ despite Urbanski informing HR Manager Carrigan that he could. PX 76; PX 97. Respondents failed to provide any justification for failing to provide Urbanski light duty during this time period. Accordingly, as timing and Respondents' other

⁵¹ Respondents contend that Urbanski was returned to work when he was released to full duty on July 8. ECF 11 at 37. However Urbanski returned to work on July 8, weeks after he was released to full duty. During that time period, Respondents attempted to change his work hours, duties, and location. See PX 97.

1 unfair labor practices suggest, Petitioner has shown a likelihood of success in proving that
2 Respondents' conduct was motivated by hostility toward Urbanski's union activity.

3 Respondents further contend that their conduct toward Urbanski after he returned to work
4 on July 8 was essentially innocuous and based on legitimate purposes. According to
5 Respondents, Urbanski reported directly to Saxe because DeStefano was on vacation and no one
6 else was there "to give him assignments or direct his work." ECF No. 11 at 37-38. Respondents
7 further suggest that the extent of Saxe's supervision of Urbanski amounted to an email with a list
8 of assignments to complete. ECF No. 11 at 38.

9 Respondents' defense fails to account for the fact that prior to his injury, Urbanski
10 worked independently by reviewing show reports from the previous night to determine what
11 maintenance had to be completed. Moreover, record evidence shows that the extent of Saxe's
12 supervision of Urbanski far exceeded a single email providing a list of assignments. Rather, Saxe
13 repeatedly emailed Urbanski over the course of a few days, multiple times a day, questioning
14 Urbanski's every move. In fact, Saxe went so far as prohibiting Urbanski from working on any
15 tasks unless Urbanski received written approval from either DeStefano or himself, which was far
16 afield from the independent working conditions Urbanski enjoyed before. PX 79. Thus,
17 Respondents' justification for Saxe's involvement wholly fails to account for, and drastically
18 minimizes, the level of supervision Saxe imposed. Accordingly, based on the inexplicable nature
19 of Respondents' conduct, the timing, and Respondents' anti-union animus borne out throughout
20 the record, Petitioner has shown a likelihood of success in showing that Respondents
21 discriminated against Urbanski by imposing more onerous working conditions on him through
22 closer supervision.
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Regarding the need for relief, Urbanski's rights are not the only ones at stake. The value in a court order is that it provides all employees reassurances that their rights will be effectively, and timely, protected and protects all employees from recurrences of unlawful conduct.⁵² Here, every employee who voted in the election would have seen Urbanski acting on behalf of the Union as an observer. Those same employees would likely have seen or heard of the changes to Urbanski's working conditions after he exposed himself as a union supporter. The benefit of a cease and desist order, along with the appropriate notices given to these employees, will ensure that they know, should they stick their necks out like Urbanski, that their rights will be protected and that Respondents will be held accountable. Accordingly, relief is appropriate and necessary even in the absence of Urbanski's continued employment.

d. Petitioner has Shown a Likelihood of Success in Showing that Respondents' Wage Increase Violated the Act

As discussed in Petitioner's MPA, Saxe authorized a wage increase for theater employees on March 14, so suddenly that payroll barely had enough time to make it retroactive per Saxe's instructions. Respondents' rebuttal of this allegation is erroneous in that: (1) Respondents misrepresent the applicable legal framework, and (2) Respondents merely set forth conflicting evidence to show that the wage increase was previously planned. Respondents' rebuttal fails to undermine Petitioner's strong showing of likely success on the merits of this hallmark violation.

First, Respondents claim that the wage increase was lawful "because the laboratory conditions doctrine does not apply in the absence of a Petition for Representation Election." ECF No. 11 at 38. According to Respondents, an employer's grant of benefits, such as a wage

⁵² See *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1410-11 (6th Cir. 1992) (voluntary remedial action by respondent did not eliminate need for 10(j) injunction where "the alleged unfair labor practice could recur"); *Ahrens v. Bowen*, 852 F.2d 49, 52-53 (2d Cir. 1988) (voluntary remedial action did not render claim moot where defendant failed to establish that the likelihood of further violations was sufficiently remote to make judicial relief unnecessary).

1 increase, “is only violative of the Act during the ‘pre-election period’ or ‘critical period’ defined
2 as the period between the filing of an election petition and the holding of the election itself.”
3 ECF No. 11 at 39 (citing *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961)). Simply, this is
4 not Board law as it pertains to the instant allegation. The laboratory conditions doctrine and
5 “critical period” is the standard the Board applies to determine, not whether there is a violation
6 of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), but whether a re-run election ought to be
7 conducted based on an employer or a union’s conduct that affected the outcome.⁵³

8 At issue here, is whether Respondents’ wage increase violated Section 8(a)(1) of the Act
9 (29 U.S.C. § 158(a)(1)). Under applicable Board law, a wage increase during the course of a
10 union campaign for the purpose of dissuading their employees from supporting the union
11 squarely violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).⁵⁴ The Board will infer
12 unlawful motivation when an employer grants benefits during an organizing campaign without
13 showing a legitimate business reason.⁵⁵ Here, Respondents can only overcome such a finding by
14 showing a legitimate reason for the timing of the wage increase.⁵⁶

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16 In an attempt to do so, Respondents set forth conflicting evidence related to when they
17 increased employees’ wages and assert that the increase was “planned for months prior.” ECF
18 No. 11 at 40. With regard to timing, Respondents assert that they increased wages “on or around
19 March 5.” However, evidence establishes that the wage increase was not authorized until the

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21 ⁵³ *Accubuilt, Inc.*, 340 NLRB 1337 (2003); *Gibraltar Steel Corp.*, 323 NLRB 601 (1997); *Ideal Elec. & Mfg., Co.*, 134 at 1278.

22 ⁵⁴ *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1 (2018) (affirming ALJ finding that
23 wage increase and promise of no layoffs during union campaign violated the Act, in absence of
representation petition).

24 ⁵⁵ *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 7 (2015).

25 ⁵⁶ *Shamrock Foods Co.*, supra; *Real Foods Co.*, 350 NLRB 309, 310 (2007); *Jewish Home for
26 the Elderly of Fairfield County*, 343 NLRB 1069, 1087-1090 (2004); *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961-962 (2004).

1 early morning of March 14 – on the heels of the momentous March 13 union meeting. PX 50;
2 *see also* PX 98 (personnel forms reflecting wages increase granted per Saxe’s (“DS”) March 14
3 email). However, Saxe instructed payroll to make the increase retroactive. PX 50. Respondents
4 have failed to provide any justification for the apparent last-minute decision to implement the
5 wage increase, retroactively, as they did.

6 Finally, Respondents fail to support their position that the wage increase was even
7 planned for months prior to Saxe’s authorization. Respondents, resorting to their failed scapegoat
8 theory, claim that former supervisor Pendergraft was supposed to increase wages as far back as
9 January, but never did. ECF No. 11 at 40. However, aside from Saxe’s self-serving testimony on
10 this issue, there is no record evidence to support this. In fact, documents show otherwise. An
11 email shows that it was Pendergraft who proposed increasing wages for theater employees in
12 December, contrary to Respondents’ contention that Saxe was the one who directed Pendergraft
13 to do so. PX 99. Clearly, although Pendergraft, and possibly others, suggested increasing wages
14 to remain competitive in the industry months before the union campaign, Respondents took no
15 action on those suggestions until they faced the prospect of a unionized workforce.

16 Moreover, other documents show that Saxe was contemplating an entirely different type
17 of wage change just prior to the implementation of the hourly wage increase. Records show that
18 as late as March 4, 2018, Saxe was considering paying production employees based on a flat
19 rate, per show, rather than hourly. PX 100; PX 101. Again, this indicates that Saxe’s decision to
20 increase wages as he did on March 14, was not, in fact, planned for months as Respondents
21 contend. Accordingly, and in the face of highly suspect and conflicting evidence on when the
22 decision to increase wages was made, Respondents will likely fail in meeting their burden in
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1 showing a legitimate reason for the timing of the wage increase. Accordingly, Petitioner has a
2 strong likelihood of success.

3 e. Petitioner has Established a Likelihood of Success on the Merits of the
4 Remaining Allegations Addressed by Respondents

5 Respondents attempt to rebut Petitioner's showing that he will likely succeed on the
6 merits of several other allegations related to Saxe and DeStefano's various statements and
7 conduct that otherwise violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). In doing so,
8 as discussed below, Respondents merely set forth conflicting evidence or otherwise attempt to
9 minimize their conduct.

10 With regard to allegations that Saxe and Estrada created the impression that employees'
11 union activity was under surveillance and that Estrada directed employees not to be seen with
12 union supporters and implicitly threatened consequences for doing so, Respondents either set
13 forth a different version of events or rely on general denials to undermine Petitioner's showing of
14 a likelihood of success on the merits. ECF No. 11 at 41-42. Respondents further argue that
15 because certain allegations, such as these, boil down to credibility issues, "Petitioner cannot
16 claim that it is likely to succeed[.]" However, Respondents' position runs contrary to Petitioner's
17 burden here, which is to set forth evidence and a legal theory supporting the allegations.
18 Petitioner has done so. See ECF No. 1, MPA at 4-8, 12-14.

19 With regard to the allegation that DeStefano created the impression of surveillance on
20 May 16 by sending text messages to employees instructing them to inform her of whether they
21 would be using the company's transportation services to the election site, Respondents attempt to
22 rebut Petitioner's showing by arguing that the messages did not violated the Act because
23 DeStefano "did not in any way elicit the employee's union views, inquire into whether that
24 employee would vote, or insinuate that the employees should vote[.]" ECF No. 11 at 42.
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1 Importantly, employees' choice of whether to vote in an election or not is a protected right.
2 Employers do not have a corollary right to know whether an employee chooses to exercise that
3 right.⁵⁷ DeStefano's text message, instructing employees to inform her one way or the other
4 whether they would be using the shuttle bus to the election site would leave any reasonable
5 employee with the impression that Respondents were keeping track of who exercised their right
6 to vote and who did not. Upon that basis, Petitioner has shown a likelihood of success of the
7 merits of the allegation that DeStefano created the impression that employees' protected activity
8 was under surveillance.

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10 **D. Injunctive Relief is in the Public Interest**

11 Based on the forgoing, and for the reasons discussed with Petitioner's MPA, the Court
12 should, respectfully, find that injunctive relief is in the public interest. Petitioner has shown a
13 likelihood of success on the merits, and the likelihood of irreparable harm. Respondents' have
14 failed to show that the balance of hardships weigh in its favor. Thus, the public interest is best
15 served by granting the injunctive relief sought in order to prevent Respondents' unfair labor
16 practices from reaching fruition while that Board's adjudication process runs its course.

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25 ⁵⁷ See *B&K Builders, Inc.*, 325 NLRB 693 (1998) (finding an employer created the impression of
26 surveillance by asking employees about their intentions to cast ballots in a Board election).

